SERVED: November 14, 1996

NTSB Order No. EA-4496

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. DARRELL F. ALESSI Respondent.	)	Docket SE-13930

OPINION AND ORDER

Both the Administrator and respondent, pro se, have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered in this proceeding at the conclusion of an evidentiary hearing held on October 2, 1995, pursuant to an emergency order of revocation[1] alleging violations of sections

[1]Respondent waived his right to expedited review.

Both parties filed appeal briefs and reply briefs. We have considered and rejected respondent's objection to the

61.59(a)(3) and (4) of the Federal Aviation Regulations (FARs), 14 C.F.R. Part 61.[2] Despite concluding that respondent's certificate had been altered, the law judge decided that the Administrator did not prove, by a preponderance of the evidence, that respondent reproduced his certificate for a fraudulent purpose. Finding only a violation of section 61.59(a)(4), the law judge changed the order of revocation to a 12-month suspension of respondent's Airline Transport Pilot (ATP) certificate, specifically excluding from the suspension respondent's flight engineer and mechanic certificates. As discussed below, we reverse the law judge's decision, in part, and uphold the Administrator's revocation order in its entirety.

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Administrator's Motion for an Extension of Time to file his reply, as the Administrator demonstrated good cause and no prejudice befell respondent as a result of the extension. Further, in a signed declaration, the Administrator averred that respondent, in fact, agreed to the extension over the telephone.

With regard to another procedural matter, on April 26, 1995, the Administrator amended the order of revocation, which originally alleged a violation of section 61.59(a)(3) only, to include the 61.59(a)(4) charge. Respondent then filed, on June 7, 1995, a motion to dismiss the complaint, wherein he objected to the amendment. The law judge issued an order denying the motion on July 11, 1995. We have not been persuaded that respondent was prejudiced by the amendment of the complaint.

[2]The pertinent regulation states:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records

(a) No person may make or cause to be made-

* * * *

(3) Any reproduction, for fraudulent purpose, of any certificate or rating under this part; or
(4) Any alteration of any certificate or rating under

The order of revocation alleges, in pertinent part:

1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot (ATP) Certificate No. 1738964, Airframe and Power Plant Certificate No. 341326964, and Flight Engineer Certificate No. 341326964.

2. Your ATP Certificate does not include a rating to operate a B-747, B-727 or B-707 aircraft.

3. On or about March 27, 1994, [you] submitted an employment application to Polar Air Cargo which included a copy of your ATP certificate.

4. On that copy of your certificate under "Ratings" was typed, "B707, B727, B747."

5. That statement on the copy of your certificate falsely represented your certificate ratings.

6. You knew that the statement was false.

The Administrator further alleged that respondent lacked the qualifications required of a certificate holder, and had failed to exercise the care, judgment, and responsibility required of a certificate holder.

The following facts were established at the hearing. In March 1994, respondent submitted an application for a position as a flight officer with Polar Air Cargo, a new carrier that did not yet have an operations certificate.[3] According to the testimony

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this part.

[3]The application consisted of a Polar Air Cargo Application for Employment, filled out by hand; respondent's resum,, which indicated under the subtitle of "RATINGS," among other things, "ATP Multi-Engine Jet, B-747, B-707, B-727, CE-500, LR-Jet"; a photocopied letter dated February 21, 1994, stating that respondent had completed "Tower Air's FAA approved B 747 Initial Ground training and Basic Indoc. Course"; and a photocopied page on which appeared 1) a Flight Engineer certificate with a rating for "Turbojet powered," issued to respondent by the FAA on September 14, 1978, 2) a mechanic certificate, with airframe and

of a recruiter for Polar Air, applicants who were current and type-rated in the B-747 were put into the first-tier category.[4] A list of potential recruits was submitted to the FAA principal operations inspector (POI), who then cross-checked their credentials against FAA records to ensure that Polar Air was considering only qualified pilots. The POI subsequently notified Polar Air that respondent did not have a B-747 rating.[5]

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powerplant ratings, issued to respondent by the FAA on November 2, 1978, 3) a first class medical certificate, dated 8/27/93, issued to respondent by the FAA, 4) an ATP certificate issued to respondent by the Republic of Honduras on October 29, 1993, 5) an FCC restricted radio-telephone operator permit, dated September 9, 1969, and 6) an ATP certificate, number 1738964, issued to respondent by the FAA on March 17, 1980, containing ratings and limitations that read as follows:

> AIRPLANE, MULTIENGINE LAND
> CE-500 LEARJET B 707 B 727 B 747 sa
> COMMERCIAL PRIVILEGES
> AIRPLANE SINGLE ENGINE LAND

(Exhibit (Ex.) A-1.) The ATP certificate, number 1738964, surrendered by respondent pursuant to the revocation order is dated March 15, 1980 and contains the following ratings:

> AIRPLANE, MULTIENGINE LAND
> CE-500
> COMMERCIAL PRIVILEGES
> AIRPLANE SINGLE ENGINE LAND

(Ex. A-7.)

[4] The recruiter testified that, while respondent appeared, from his application, to possess the requisite qualifications, he was placed on the second list because he was not current under FAR Part 121. (Transcript (Tr.) at 14.)

[5] Contained in the FAA's complete airman file for respondent (Ex. A-5), was a Temporary Airman Certificate, ATP, number 1738964, dated March 17, 1980, with ratings for Airplane Multi-engine Land, CE-500, LR-Jet, Commercial Privileges, Airplane Single-engine Land. It also listed March 15, 1980 as the date of a superseded airman certificate. There was a similar temporary

Respondent stipulated that he does not hold type ratings issued by the FAA for the B-747, B-727, or B-707, but claims that he has type ratings issued to him for those aircraft by the Saudi Arabian aviation authority and, as such, he did not violate the FARs as alleged. (Tr. at 6-7, 104.) He admitted, however, that he filed an employment application with Polar Air which included a photocopy of his ATP certificate, and that by this action he was representing his qualifications to Polar Air.[6] (Tr. at 101, 103.) In discussing this copy of his ATP certificate, respondent stated,

> When a pilot gets a rating, the first thing he does in this market, as we always do, is make a copy. To this day, I still have a copy of that rating. And what I did is I superimposed my other ratings on it, and the mistake I made was not sending Polar Air the certificate I held the day I applied, which was still an ATP with type ratings, but not those and not the SA on it.

(Tr. at 96.)

Martin Ingram, a former supervisor in the FAA's New York Flight Standards International Field Office, the office responsible for the oversight of the Saudi Arabian airman certification program and implementation of a memorandum of

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certificate, dated March 15, 1980, that contained all the same ratings except "LR-Jet." Id.

[6] In response to the question, "So the items that you presented to Polar Air were what you purport your qualifications to be," respondent replied, "Basically, yes." (Tr. at 103.) Yet, when asked, "Is there any document that says you are type rated, given by the FAA, for 727, 707, and 747 aircraft," respondent stated that he "[n]ever purported to have one." (Tr. at 104-05.) He maintains that he only has a photocopy of that FAA-issued certificate and that the original was retained by the Saudi Arabian civil aviation authority. (Tr. at 96-98.)

agreement between the United States and Saudi Arabia enacted to improve the Saudi airman certification and training program, testified that, in his experience, the Saudi Arabian civil aviation authority (PCA) would not issue an airman certificate with a 747, 707, or 727 rating unless the airman already had a certificate issued by the civil aviation authority of another country (such as the FAA), provided the PCA approved of that country's certification program. (Tr. at 33-34, 38.) If a Saudi certificate was issued based on an American certificate, it would so state and would reference the American certificate number.[7] (Tr. at 40.) He further testified that he had never heard of anyone from the PCA writing anything onto an American certificate, and that he had never seen the letters "sa" on an airman certificate before. (Tr. at 41, 55.)

The law judge concluded, and we agree, that respondent altered his certificate. He found respondent less than credible, a conclusion which the evidence amply supports.[8] The evidence

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[7] The law judge asked whether the Saudi Arabians would issue a certificate to an ATP with an American airman certificate, who received a type rating in Saudi Arabia. Inspector Ingram replied that, under those circumstances, the FAA would issue, in Saudi Arabia, an American certificate with the appropriate type rating on it. The airman would then present the new certificate to the PCA, who would issue the airman a Saudi Arabian certificate with a notation that it was based on an American certificate. (Tr. at 40-41.)

[8] For example, the law judge discussed various discrepancies that he found between a form in the FAA's airman file (Ex. A-5) and a subsequent copy of the form admitted into evidence by respondent. (Ex. R-17.) The form is a DD-214, listing data regarding respondent's time in the U.S. Army. We have compared

also clearly shows that respondent submitted the altered certificate to a prospective employer in the hopes of being considered qualified for the position and ultimately obtaining employment. Therefore, we reject the law judge's finding that the Administrator did not prove that respondent altered his certificate for a fraudulent purpose.

In the initial decision, the law judge discussed Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976), in which the court discussed the elements of intentional falsification (the first three elements of fraud) and fraud under FAR section 61.59(a)(2). The court stated that the elements of fraud are

> (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.

Id. at 518.

The regulation in the instant case, section 61.59(a)(3), refers to alterations made "for a fraudulent purpose." The Board has squarely addressed this issue before and determined that proof of action taken in reliance upon a false representation is not necessary to show that an alteration was made for a fraudulent purpose. In Administrator v. Borregard, NTSB Order No. EA-3863 (1993), aff'd 46 F.3d 944 (9th Cir. 1995), we discussed the meaning of the phrase "for fraudulent purpose" and determined that, in cases where the question was "whether an alteration was made with a fraudulent purpose in mind, not

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the two forms and note that the evidence clearly supports the law

whether the entry itself perpetrated a fraud," it was not necessary, under Hart v. McLucas, to look beyond whether a respondent intended to deceive.[9] Id. at 8-9. We reiterated the point in Administrator v. Coomber, NTSB Order No. EA-4283 (1994), where the respondent was charged with altering an airman medical certificate for fraudulent purpose, in violation of FAR section 67.20(a)(3), stating that "[p]roof of intent to deceive is sufficient to show a fraudulent purpose under that section." Id. at 6-7. Proof of action taken in reliance was not required, as the regulation was directed at alterations for fraudulent purpose, not actual fraud.

Respondent, on appeal, claims that the testimony of Inspector Ingram should be discounted because respondent's experiences in Saudi Arabia predated the inspector's tenure as a supervisor responsible for oversight of the Saudi Arabian airman certification program. This argument fails, inasmuch as Inspector Ingram, in working to implement the memorandum of agreement to improve the certification program, would have been aware of problems within that program.[10] Furthermore, respondent admitted that he did not have the FAA-issued ratings that were "superimposed" onto his airman certificate. Consequently, even if, as he claims, he had been type rated in Saudi Arabia, he did

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judge's assessment that Ex. R-17 appears to have been altered.

[9] Borregard involved the alteration of maintenance records for fraudulent purpose, in violation of FAR section 43.12(a)(3).

[10] Inspector Ingram testified that he received many in-depth briefings on the workings of the Saudi Arabian airman

not have the same ratings in this country.

As to respondent's challenge of the law judge's credibility determination, the law judge was in the best position to evaluate the demeanor of the witnesses, resolve issues of fact, and ultimately issue credibility findings. Our review of the record reveals that those findings were neither arbitrary nor capricious and, therefore, will not be disturbed. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

In sum, the facts, as discussed supra, clearly show that the Administrator proved by a preponderance of the evidence that respondent altered and reproduced his ATP certificate with a fraudulent purpose, in violation of FAR sections 61.59(a)(3) and (4). Such conduct demonstrates a lack of the care, judgment, and responsibility required of an ATP certificate holder and supports the revocation of respondent's ATP, mechanic, and flight engineer certificates. See, e.g., Administrator v. Stanberry, 7 NTSB 934, 935-36 (1991)(respondent's airman certificate and airframe and powerplant certificate revoked for his alteration of markings on an aircraft to confuse its identity), and cases cited therein.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. Respondent's appeal is denied;

3. The initial decision is reversed in part and affirmed in part; and

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certification process. (Tr. at 50, 60.)

4. The order of revocation is reinstated.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.